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No. 95-996

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAMES J. MALOT,
Petitioner,

v.

ROY F. WESTON, INC. and
WESTON SERVICES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's attempted deprecation of the importance of the questions on which Petitioner seeks review (R.B. p. i)[1] is contradicted by Chief Judge Newman of the Second Circuit in the very same writing it cites.[2] In his Letter to the Editor of the *Wall Street Journal* published January 2, 1996 (cited and quoted at R.B. 4), Judge Newman defended *unpublished opinions* but proclaimed his disapproval of the summary affirmance procedures of some appellate courts (presumably including the Federal Circuit's Rule 36), by stating:

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[1] Hereinafter "R.B." refers to Respondent's Brief in Opposition and "Pet." to the Petition herein; "A" refers to the Joint Appendix below.

[2] Newman, Hon. Judge Jon O., Letter to the Editor, *Wall Street Journal*, January 2, 1996, p. A9.

> "Rather than follow the practice of some appellate courts of affirming insubstantial appeals with one-word (published) opinions that say only 'affirmed', the Second Circuit prefers in such cases to afford counsel and the public at least a brief written statement of the reasons for the affirmance in an unpublished opinion."

Clearly, and contrary to Respondent's assertion, there *is* "intercircuit conflict" (R.B. p. 2) on the propriety of summary affirmance, even when the appeal is "insubstantial"—and far more so, where (as here) summary affirmance is availed of to shield an appellate court from investing the time and effort requisite to the full *de novo* review of a district court summary judgment that was promised by its own precedent.[3]

The balance of Respondent's opposition avails liberally of the same art and craft that inveigled the District Court into entering its decision and says nothing new, apart from the improper levelling of unmerited charges against Petitioner and his counsel (R.B. pp. 7-8, 14-15).

Petitioner presented a detailed exposition in this Court of several of the numerous genuine issues of material fact raised in the record that was before the District Court on the summary judgment motion (Pet. 3-15) in anticipation of Respondent's continued inaccurate insistence that its evidence was "uncontroverted" (R.B. p. 11). The Petition details that Petitioner *controverted* Respondent's affidavits by reliance on *at least* the third party affidavits in the reissue patent file history, that file history itself, the Knopik patents, the Knopik deposition, the Feenstra deposition, the Sanders deposition and documentary evidence from various third party sources *in addition* to Petitioner's own declaration based on his personal, continuous, day-to-day familiarity with soil and groundwater decontamination since 1980, including his post-1980 personal experience and expertise in conducting the claimed process

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[3] See cases cited at Pet. p. 16, n.24.

(A1367-68).[4] Petitioner thus proceeded foursquare with the holding of *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986), that under Rule 56 the nonmoving party need not produce its evidence in a form admissible at trial, but need only show the existence of genuine issues of material fact deserving of a trial. Respondent here does not attempt to show that any of the specific fact issues the Petition highlights was nullified or even met by its evidence.[5]

Respondent's effort to belittle the holding of *Washburn & Moen Mfg. Co.* v. *Beat 'Em All Barbed-Wire Co.*, 143 U.S. 275 (1892) (R. Br. 10-11) ignores both (i) the Federal Circuit's consistent adherence (prior to this case) to the century-old *Washburn & Moen* standard of proof for prior use or prior invention, as *exemplified* by *Price*

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[4] The EPA April 1993 Report EPA/542/R-92/012 "Cleaning Up the Nation's Waste Sites: Markets and Technology Trends" at pages 3, 16, 19 and 22 shows that completely removing volatile organic contaminants by the claimed process (referred to as "soil vapor extraction") is the *most used* cleanup technology at the nation's contaminated sites—and thus demonstrates that Petitioner's patent is an important one, deserving of full and fair judicial treatment.

[5] For example, Respondent did not establish, one way or another, what is stated in the quotation at R.B. pp. 13-14. It presented a sworn *opinion, without* data or other supporting evidence for the quotation, and mislabelled this as "personal knowledge". That opinion is directly controverted by the Feenstra deposition testimony cited at Pet. p. 12.

As another example, Respondent seeks to equate, as only *semantically* different (R.B. 14-15) the 1-5 parts of contaminant per billion parts of vadose zone soil left by Petitioner's claimed complete decontamination process (attested to by Elliott and Komoski in the file history), with the *nonvolatile* gasoline fractions representing substantial residual contamination (e.g., Table I, A230, of the API Report with accompanying text indicates that hexane and heavier hydrocarbons, which do not appreciably spontaneously volatilize, may account for as much as 69 percent of total gasoline contaminant) that is left behind by the "venting" process hypothesized in the API Report. This is the *only* process Respondent's supporting documentation (including the alleged corroborating material) shows that Knopik, ORS/Yaniga, Exxon or Shell may have practiced prior to Petitioner's invention of the Claim 8 process.

v. *Symsek*, 988 F.2d 1187 (Fed. Cir. 1993)[6] and (ii) the fact that *Price* affirmatively holds that "An evaluation of *all* pertinent evidence must be made so that a sound determination of the credibility of the inventor's story may be reached" (988 F.2d at 1195). This, of course, means that the discrepancies of fact between Knopik's affidavit, his earlier issued patents and other evidence in the record before the District Court were *required* to be evaluated. Every indication in both courts below is that either no evaluation was made at each level, or else that the District Court made impermissible fact findings which the Court of Appeals uncritically rubber-stamped. Either way, the use of Federal Circuit Rule 36 to mask this dereliction of judicial duty raises a serious issue for review.

CONCLUSION

Petitioner has demonstrated that the Court of Appeals failed to afford this case the appellate review to which the controlling precedent entitled it. That Court's resort to summary affirmance to shield its own action, if left undisturbed, will surely recur to the manifest detriment of our legal system.

Respectfully submitted,

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[6] The rhetorical flourish in *Washburn & Moen* that the proof must be "clear, convincing and beyond a reasonable doubt" (143 U.S. at 284-85), of course, requires that the highest civil burden of proof—i.e. clear and convincing—be discharged to prove prior use or invention, as *Price v. Symsek* indeed discusses exhaustively (988 F.2d at 1190-94).